

Body Glove IP Holdings LP v On Five Corp.
2022 NY Slip Op 33896(U)
November 16, 2022
Supreme Court, New York County
Docket Number: Index No. 652857/2021
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART 42

Justice

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BODY GLOVE IP HOLDINGS LP,
Plaintiff,

- v -

ON FIVE CORPORATION,
Defendant.

INDEX NO. 652857/2021

MOTION DATE 08/02/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 23, 24, 25, 26, 27, 28, 31, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47 were read on this motion to/for CONTEMPT.

In this breach of contract action, the court, by a decision and order dated August 31, 2021, granted the plaintiff's application for leave to enter a default judgment against the defendant pursuant to CPLR 3215 in the sum of \$300,000.00, plus costs and statutory interest from July 27, 2020. On November 1, 2021, the Clerk entered judgment in the sum of \$334,775.34 against the defendant and in favor of the plaintiff. The judgment has not been satisfied. On March 18, 2022, the plaintiff served a restraining notice purporting to restrain any bank accounts in the name of the defendant, On Five Corporation, upon nonparty JPMorgan Chase Bank, N.A. (Chase), incorrectly named in the restraining notice as "Chase Bank." Chase did not comply. The plaintiff now moves pursuant to CPLR 5222 and 5251 for an order holding Chase in contempt for its failure to comply. Chase opposes the motion. The motion is denied.

CPLR 5222 permits a judgment creditor to serve a restraining notice upon "any person," with certain exceptions not relevant here, who, at the time of service, is "in the possession or custody of property in which he or she knows or has a reason to believe the judgment debtor has an interest." CPLR 5222(a)-(b). A restraining notice must specify all parties to the underlying action, the date that judgment was entered, the court in which it was entered, the amount of the judgment and the amount then due thereon, and the names of the parties in favor of and against whom the judgment was entered. CPLR 5222(a). It must also state that disobedience of the restraining notice is punishable by a contempt of court. Id.; see CPLR 5251. A garnishee served with a proper restraining notice is "forbidden to make or suffer any sale, assignment, or transfer of, or any interference with" the relevant property for one year after service of the restraining notice, or until the judgment is satisfied or vacated, whichever is sooner. CPLR 5222(b). In the event the garnishee violated the restraining notice, the

procedure for the contempt punishment is supplied by Judiciary Law §§ 753 et seq. In relevant part, the Judiciary Law requires that an application for contempt

“shall contain on its face a notice that the purpose of the [application] is to punish the accused for a contempt of court, and that such punishment may consist of fine or imprisonment, or both, according to law together with the following legend printed or type written in a size equal to at least eight point bold type:

**WARNING:
YOUR FAILURE TO APPEAR
IN COURT MAY RESULT IN
YOUR IMMEDIATE ARREST
AND IMPRISONMENT FOR
CONTEMPT OF COURT.”**

Judiciary Law § 756. “Refusal or willful neglect” to obey a restraining notice is punishable as contempt. CPLR 5251.

In support of its application, the plaintiff has submitted, *inter alia*, the underlying order of default, the subject money judgment, the subject restraining notice, a letter from Chase in response to the restraining notice, and a SWIFT INTRADATA report on defendant On Five Corporation. The plaintiff served a restraining notice addressed to “Chase Bank” on Chase on March 18, 2022, and Chase responded to the notice by letter dated March 22, 2022. Chase indicated in its letter that it located no customer matching the debtor “On Five Corporation” based upon a search of data contained in Chase’s centralized customer identification and account information system. However, the plaintiff has submitted a SWIFT INTRADATA report showing that On Five Corporation maintained a business checking account at the Chase branch located at 471 W 42nd Street, New York, NY 10036, with a balance of \$44,545.00 as of February 18, 2022, one month prior to the issuance of the restraining notice.

Initially, Chase challenges the format of the plaintiff’s contempt application. Chase correctly contends that, where the alleged contemnor is not a party to the action out of which the contempt arises, the application to punish for contempt must take the form of a special proceeding. See Long Island Trust Co. v Rosenberg, 82 AD2d 591 (2nd Dept. 1981); see also Aspen Indus. v Marine Midland Bank, 51 NY2d 575, 580 (1981) (“[V]iolation of the restraining notice by the party served is punishable by contempt ... and subjects the garnishee to personal liability in a separate plenary action or special proceeding under CPLR article 52 brought by the aggrieved judgment creditor.”). Nonetheless, if personal jurisdiction over the alleged contemnor has been secured, the court may convert a motion for contempt into a special proceeding. CPLR 103(c).

Here, Chase was served with a Notice of Motion lacking the requisite legend set forth by Judiciary Law § 756, and lacking a return date, on or about May 20, 2022. Because that Notice of Motion was defective on its face, it was insufficient to obtain jurisdiction over Chase. See Matter of Devine, 126 AD2d 491 (1st Dept. 1987); Rennert v Rennert, 192 AD3d 1513 (4th Dept.

2021); Community Preservation Corp. v Northern Blvd. Property, LLC, 139 AD3d 889 (2nd Dept. 2016). Subsequently, on June 10, 2022, the plaintiff filed an amended Notice of Motion containing most of the legend, omitting the word “Your” on the second line. However, the Notice of Motion did not contain a separate notice on its face that the purpose of the application is to punish the accused for a contempt of court, and that such punishment may consist of fine or imprisonment, or both. The failure of the plaintiff to include *both* the warning and notice provisions required by the Judiciary Law is jurisdictionally fatal to its revised application. See Matter of Rojas v Recant, 249 AD2d 95, 95 (1st Dept. 1998) (Because “contempt is a drastic remedy, . . . strict adherence to procedural requirements is mandated.”); Rennert v Rennert, supra at 1515 (“It is well settled that failure to include the notice or the warning language of Judiciary Law § 756 constitutes a jurisdictional defect, requiring the court to deny the application.”). Chase has not waived its objections in this regard. Notwithstanding that counsel filed a Notice Appearance in this matter, Chase immediately and in its first and only substantive filing challenged the court’s jurisdiction based on the foregoing. Cf. Benson Park Associates LLC v Herman, 93 AD3d 609 (1st Dept. 2012) (challenge to personal jurisdiction was waived because it was not raised in nonparty accused contemnor’s answering papers). Accordingly, the plaintiff’s application must be denied for lack of jurisdiction.

Moreover, even if jurisdiction over Chase were properly obtained, the plaintiff’s application would fail on its merits. Chase does not deny receipt of the restraining order or the accuracy of the SWIFT INTRADATA report submitted by the plaintiff showing that the defendant maintains a business checking account in a Manhattan branch. However, Chase submits a transcript of a phone call between its agent and the plaintiff’s counsel establishing that, after advising the plaintiff by letter that it could not locate an account based upon the information the plaintiff provided, Chase reached out seeking additional information to help the bank locate and restrain the defendant’s account. Specifically, Chase sought such information as a Tax Identification Number, address, or account number for the defendant. Chase’s agent explained clearly that, because Chase may have other customers with similar names to the defendant, it needed to ensure that it was restraining the correct account. To be sure, restraint of the wrong account could certainly expose Chase to liability under New York law. The plaintiff’s counsel, who, at minimum, had access to the defendant’s address, and appears quite easily to have been able to find all other information sought by Chase, inexplicably refused to provide any further information. Instead, counsel told Chase’s agent that it was “not [his] responsibility,” advised her that he had commenced a contempt proceeding, and provided her with erroneous description of New York contempt law.

Contrary to the plaintiff’s contentions, Chase’s request for additional information was not unreasonable. This is particularly so because the restraining notice provides absolutely no information about the defendant corporation, such as its state of registration or domicile, other than its name. More significantly, Chase’s conduct falls far short of the standard required on a motion for contempt. See Tri-Global Management Corp. v Citibank, N.A., 39 AD3d 627 (2nd Dept. 2007) (failure to garnishee to freeze account could not be basis for contempt where the account was not names in a proper restraining notice); Tri-Global Management Corp. v Richardson, 25 AD3d 600 (2nd Dept. 2006) (same).

In light of the foregoing, the plaintiff's application is denied. The court need not reach the parties' remaining contentions.

Accordingly, it is

ORDERED that the plaintiff's motion is denied in its entirety.

This constitutes the Decision and Order of the court.



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

11/16/2022
DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE